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Reformulating Immigration Policy in Post-Apartheid South Africa

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► **To cite this version:**

Aurelia Wa Kabwe-Segatti. Reformulating Immigration Policy in Post-Apartheid South Africa: From the Aliens Control Act of 1991 to the Immigration Act of 2002. IFAS Working Paper Series / Les Cahiers de l' IFAS, 2006, 8, p. 171-185. hal-00799196

HAL Id: hal-00799196

<https://hal.science/hal-00799196>

Submitted on 11 Mar 2013

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**TEN YEARS OF
DEMOCRATIC
SOUTH AFRICA
TRANSITION
ACCOMPLISHED?**

BY

AURELIA WA KABWE-SEGATTI,

NICOLAS PEJOUT

AND PHILIPPE GUILLAUME

Les Nouveaux Cahiers de l'IFAS / IFAS Working Paper Series is a series of occasional working papers, dedicated to disseminating research in the social and human sciences on Southern Africa.

Under the supervision of appointed editors, each issue covers a specific theme; papers originate from researchers, experts or post-graduate students from France, Europe or Southern Africa with an interest in the region.

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Institut français d'Afrique du Sud, Johannesburg, 2006
(*Les Nouveaux Cahiers de l'IFAS / IFAS Working Paper Series* N°8).
ISSN: 1608 - 7194

SUMMARY

For the past ten years, South Africa has been progressively coming out of the apartheid system. Although all ties with the former regime have been severed completely, managing the heavy structural legacy has made the transition a difficult as well as an ambivalent process - difficult because the expectations of the population contrast with the complexity of the stakes which have to be dealt with; and ambivalent because the transition is based on innovations as well as continuities.

The contributions gathered in this book will try to clarify the trajectory of that transition. Offered analyses share a critical look, without complacency nor contempt, on the transformations at work. Crossing disciplines and dealing with South Africa as an ordinary and standardised country that can no longer be qualified as being a “miracle” or an “exception”, gives us an opportunity to address themes that are essential to understanding post-apartheid society: land reforms, immigration policies, educational reforms, AIDS...

This issue of IFAS Working Papers is the translation of a book published with Karthala publishers to celebrate 10 years of the Research section of the French Institute of South Africa (IFAS) and to highlight its major contribution to constructing francophone knowledge on Southern Africa.

RÉSUMÉ

Depuis dix ans, l'Afrique du Sud sort progressivement du système d'apartheid : si les ruptures avec l'ancien régime sont nettes, la gestion d'un héritage structurel lourd rend cette transition à la fois difficile et ambivalente. Difficile car les attentes de la population contrastent avec la complexité des enjeux à traiter. Ambivalente car cette transition est faite d'innovations et de continuités.

C'est cette trajectoire que les contributions réunies ici tentent d'éclairer. Les analyses proposées partagent un regard critique sans complaisance ni mépris sur les transformations à l'œuvre. Le croisement des disciplines et le traitement de l'Afrique du Sud comme un pays ordinaire, normalisé, sorti des paradigmes du « miracle » ou de l'« exception », donnent l'occasion d'aborder des thèmes essentiels à la compréhension de la société post-apartheid : réforme agraire, politique d'immigration, réformes éducatives, sida...

Ces Cahiers sont la traduction d'un ouvrage paru chez Karthala en 2004 à l'occasion des dix ans d'existence du pôle recherche de l'Institut Français d'Afrique du Sud (IFAS) afin de souligner sa contribution majeure à la construction des savoirs francophones sur l'Afrique australe.

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chapter nine

reformulating
immigration policy in
post-apartheid south
africa

from the aliens control act of 1991
to the immigration act of 2002¹

aurelia wa kabwe-segatti

ABSTRACT

While socio-political and institutional transformations have been extremely rapid over the past ten years, the reform of the South African immigration policy and legislation has been delayed for almost a decade. Looking back at the system in place when the ANC took office in 1994, the author describes the successive management of migration by the De Klerk, Mandela and Mbeki administrations. Observing the legislative debate that led to the 2002 Immigration Act not only unveils fault lines within the Tripartite Alliance but also reveals transversal party positioning and discourses.

RÉSUMÉ

Tandis que les transformations socio-politiques et institutionnelles ont été extrêmement rapides ces dix dernières années, la réforme de la politique d'immigration sud-africaine et de sa législation ont été retardées pendant près de dix ans. En revenant sur le système en place à l'arrivée au pouvoir de l'ANC en 1994, l'auteur décrit les types de gestion successifs des migrations des administrations De Klerk, Mandela et Mbeki. L'observation du débat législatif qui a mené à l'adoption de l'Immigration Act de 2002 ne révèle pas seulement les lignes de fracture au sein de la Triple Alliance mais également les prises de position et les discours au-delà des clivages partisans.

In many respects, the advent of democracy in South Africa in the mid-1990s turned the country into a case in point for observing regime transition (O'Donnell & Schmitter 1989; Darbon 1995). Yet, the management of power and the unpacking of the African National Congress (ANC) policy have been continuously scrutinized since by analysts interested in gaining some insight into the policy-making process, its overall purpose and achievements. One area, particularly appropriate to international comparison, is immigration: in a little more than a decade, the country of apartheid has turned into a new Eldorado towards which migrants from all origins, mainly Africans but also Asians and Europeans are striving. This influx at the tip of the continent entails major socio-economic and political challenges. While, in a number of areas, analysts find it hard to keep up with the rhythm of sociological, institutional or legislative transformations due to their quantity and rapid evolution in post-apartheid South Africa (over 800 laws were passed in ten years), as far as immigration is concerned, the challenge is more about what has actually changed since 1994 (Crush 1996; Hill & Kotzé 1998). Attempting a broad assessment by standing back from short term change observation, can thus be useful if one is to ignore the meandering of public policy-making processes and highlight long term continuities and significant changes in national trends.

¹ This chapter draws from research from my PhD thesis completed from 1998 to 2003 on the "Position of Foreigners in the 'New' South Africa: Reforming Immigration Policy. 1986-2002", unpublished.

This chapter will focus first on the system at work and its characteristics when the ANC came into power in 1994: how did the de Klerk administration manage the end of apartheid and its socio-economic implications as far as migrations were concerned? What was the actual management of the unprecedented massive influxes of migrants in the mid-1990s under Mandela and Mbeki? Eventually, why did the passing of new legislation take eight years? What can be expected from the Immigration Act of 2002 as far as the position of foreigners in post-apartheid South Africa is concerned?

THE SPECIFICITIES OF A MIGRANT SYSTEM: THE TWO-GATE POLICY

Like many other immigration countries, South Africa, throughout the 20th century, gradually introduced in its legislation ways and means to select new comers. These selection criteria and modes did not emerge *ex nihilo* according to some carefully planned pre-established programme, but according to legislators' position, to priorities defined by political actors, to the pressure of international and national challenges, in brief, according to a number of elements constituting the historical trajectory of the country. The various debates taking place over time resulted in a series of laws, decrees, regulations, circulars, internal guidelines within Government departments that shaped, since the creation of the Union of South Africa, its immigration policy.

The specificity of the South African case does not reside so much in the set up of increasingly drastic selection criteria according to social, racial and religious prejudices prevailing in this type of colonial society. Indeed, a number of other immigration countries adopted very similar policies, including Europe². The South African specificity rather comes from the parallel and simultaneous movement of denationalisation of the indigenous population to serve the political economy of apartheid (Morris in Gelb 1991; Marais 1998). The major part of the 20th century was thus characterised by the progressive consolidation of a system labelled 'two-gate policy': one front gate welcoming populations corresponding to the criteria of attractiveness defined by the minority in power, the other, the back gate, with a double function, on the one hand preventing unwanted migrants from entering and on the other, letting in but only on

² In 1901, the Immigration Restriction Act founded the White Australia policy which was only officially terminated in 1973; in 1910, racial criteria on entry to Canada were made explicit; in 1921, the first quota laws based on national origin were implemented in the United States and in 1924, the Johnson-Reed Act was adopted in order to preserve the racial composition of the American population; in 1974, France officially put an end to all non-European immigration apart from family reunification.

a temporary basis cheap and docile labour. This system intricately connected to the 'grand apartheid' scheme, particularly through the homeland policy, blurred the border lines between citizens and foreigners as few other societies have. The various legislations on migration passed throughout the 20th century, the proactive White (and Protestant) immigration policy of successive Nationalist governments, the relations between the South African state, the agricultural and mining sectors and labour-sending neighbouring countries, and finally apartheid legislation itself, specifically on residential segregation and preferential job areas, all these elements contributed to foster and convey mainly coercive migration management practices and to shape stereotyped images of foreigners.

The situation that prevailed under the de Klerk administration resulted from ninety years of legislative juxtaposition aiming at serving a certain vision of society. Three periods can be identified regarding immigration legislation: from 1913 to 1937, legal criteria defining foreigners and their access to South African territory were set up and regulated; from 1937 to 1986, the existing legislation was gradually aligned on the racist criteria of 'separate economic development' and served the objectives of the two-gate policy; lastly, from 1986 to 1994, there was a widening gap between harboured intentions of legislative normalisation within the context of the deep political transformations then at work in the country and the reality of deeply entrenched practices.

Let us try first to sketch out briefly the major steps that led to the legislative legacy inherited by the de Klerk administration when it came to power in 1989. At the beginning of the 1990s, laws regulating immigration were essentially inherited from the 1937 Aliens Control Act, a piece of legislation adopted in a context of widespread anti-Semitism at the influx of refugees from Eastern Europe following the rise of Nazi Germany. It is through the Aliens Control Act of 1937 that the term 'alien' was first officially established in the legislation as in everyday language. Above all, the Act introduced, for the first time explicitly, the 'racial' criterion as a condition of entry into South African territory³. This law was soon complemented by the Aliens Registration Act of 1939 that marked a decisive turn in the control of foreigners on South African territory. Until then, the legislation on immigration was essentially meant to work as a 'racial sift' on entry into South African territory. The 1939 Act stressed for the first time not only control on entry but also the monitoring of foreigners inside the territory of the Union.

³ Section 4(3)(b) of this act actually stated that all applicants should be 'likely to become readily assimilated' with the European inhabitants of the Union and that they did not represent a threat to 'European culture'.

From 1948 onwards, the National Party (NP) passed three major laws that closely bound together immigration policy — and therefore the status of foreigners — and citizenship and the management of indigenous populations: the 1950 Population Registration Act (on racial classification), the 1962 Commonwealth Relations Act (that ended uncontrolled trans-border movements in Southern Africa) and the 1955 Departure from the Union Regulation Act (requiring an authorisation to depart from South African territory).

Yet, it was not before 1961 that in addition to selection on entry and drastic control measures at the borders, an actual proactive White immigration policy was developed with the creation of a specific government department entirely devoted to immigration. So far, immigration had essentially been outsourced to private initiatives after unsuccessful governmental attempts at the beginning of the century with the Milner administration. In the 1950s, the NP faced a dilemma. To suppress purely and simply immigration, at the time largely Anglophone, meant to expose the white population to the risk of “sinking into an ocean of colour” whereas if Anglophone immigration continued, the NP still essentially Afrikaner, would lose its majority in Parliament. In the early 1960s, the political context had changed and the NP, then politically strengthened, decided to set up a proactive policy to face the increasing dearth in qualified White labour. Between 1961 and 1991, several programmes were implemented and subsidies and direct State aid allowed for the settlement of tens of thousands of European immigrants. Those subsidies, at times very substantial — reaching for instance 3 576 000 Rands in 1972-1973 — were only suppressed in 1991, that is three years after F.W. de Klerk took office. While the set of reforms initiated by P.W. Botha from 1982 onwards could lead to think employment priority would then at last be given to the South African Black, Indian and Coloured population, the South African State actually continued promoting White immigration well into the negotiation period that started after the ‘2 February 1990’ speech.

The immigration policy inherited by the de Klerk administration in 1989 bore three characteristics. It was first based on a classical colonial settlement policy focusing on the almost exclusive development of the needs of the European minority and its corollary, a cheap Black labour maintained in a precarious position. Secondly, the management of migrations and foreigners was discretionary by nature and often based on opaque practices. Finally, the development mode through which this policy was meant to evolve was incremental, very rarely providing enough space for assessment or even public debate.

■ FROM 1986 TO 1991: PREPARING TOMORROW'S TRANSFORMATION WITH YESTERDAY'S TOOLS.

Paradoxically, a fundamental reform, in principle, occurred in 1986. An amendment to the Aliens Control Act of 1937 was voted thus deleting from the texts for the first time since the creation of this legislation the definition of 'European' from section 4(3)(b). Adopted at a time when the country was plunged in the state of emergency at the heart of one of the harshest crises in the apartheid system, this amendment met national and international policy challenges. Removing the 'racial' criterion from the 1937 Act was meant to show tangible signs of institutional transformation in the system but also to enable the influx of qualified yet cheap personnel from other African countries into the homelands. J.C.G. Botha, the then Minister of Home Affairs, insisted that "the Government has irrevocably committed itself to removing discriminatory and offensive measures from the Statute book"⁴. The 1986 amendment thus pertains to the series of measures aimed at proving the commitment of the Botha government to reforming the system. Until then, the immigration of non-Europeans, initially made impossible by the Aliens Control Act of 1937, was regulated by two pieces of legislation: the Black (Urban Areas) Consolidation Act of 1945 and the Black Labour Act of 1964. These acts strictly limited entry into the South African territory of Black foreigners to the temporary clauses provided for within the framework of bilateral labour agreements. Family reunification in particular was forbidden. The 1986 amendment fulfilled the need to rid the legislation of politically incorrect apartheid terminology but without fundamentally transforming existing policies: selective and qualified immigration and cheap migrant labour in the mining and agricultural sectors. As very clearly stated by J.C.G. Botha, immigration policy remained a selective policy aimed at "fulfilling the country's labour needs [...] bearing in mind the needs and interests of South Africa"⁵. Finally, this amendment also intended to send signs of good will to the newly represented Indian electorate in the Tricameral Parliament: the Aliens Control Act amendment was voted simultaneously with the repeal of two acts restricting the immigration and settlement of Indians in the Orange Free State and Natal.

Criticised by the representatives of the Conservative Party as one of the "most dangerous Bills which had ever been introduced by the governing party", the 1986 amendment had in actual fact very few consequences on the granting of permanent residence. Racial criteria continued to be applied if not officially but in actual practice with the Immigrants Selection

⁴ J.C.G.Botha, in Republic of South Africa, 29 April 1986, House of Assembly Debates, Hansard, Vol.8, Cols 2333-4876, p.4429.

⁵ Ibid., p.4430.

Board keeping its entire grip over the applicants' selection process. If an applicant no longer had to be Europeans, he was still supposed to, "within a reasonable period of time after his entry into the Republic become assimilated with any community of the Republic"⁶ The level of qualifications and applicants' financial resources became, after race, the major acceptability criteria for immigrants from then on.

The arrival of F.W. de Klerk to power in 1989, the end of the East-West bipolarity with the fall of the Berlin Wall and the decision to abandon the apartheid system and the regional destabilisation policy through negotiations, all these elements contributed to the adoption of a new immigration law in 1991. However, closer scrutiny reveals that here again, the 1991 legislation was meant to tackle domestic issues rather than to be a long term management instrument for regional migrations. The particularly volatile situation of the early 1990s and the long isolation of South Africa from the rest of the continent then contributed to entrap immigration issues in an almost exclusively security logic, despite the post Cold War context.

That is precisely when the question of Mozambican refugees, that was to become one of the most thorny migration issues of the decade, came to the fore. While the number of Mozambican refugees, who were only tolerated in the homelands, kept on increasing, Pretoria opened up to the possibility of acknowledging refugee status through the signature of agreements with the United Nations High Commissioner for Refugees (UNHCR)⁷. This partial acknowledgement of refugee status stood as the beginning of a highly controversial voluntary repatriation programme for Mozambican refugees. Yet, almost simultaneously, a policy of systematic and massive forced repatriation was set up and would go from strength to strength throughout the following decade (Wa Kabwe-Segatti 2002).

The 1991 Aliens Control Act, nicknamed 'Apartheid's last act', became the cornerstone of South African immigration policy throughout the 1990s. Drafted in order to unify and simplify all previous immigration laws since 1937 as well as to mark a break away from the past, this Act, however, endorsed a fundamental paradox right from the advent of the 1994 democratic regime. In contradiction with the Interim Constitution and the 1996 Constitution in many respects, the 1991 Aliens Control Act was then declared unconstitutional and liable to constitutional review by 2002. This intrinsic contradiction played a great role in the decision to reform deeply immigration legislation with the official opening of a consultation process on the issue from 1996 onwards.

⁶ Republic of South Africa, 13 June 1986, Matters Concerning Admission to and Residence in the Republic Amendment Act No.53 of 1986, Government Gazette, Vol.252, No.10277, p.5.

⁷ Memorandum of Understanding between South Africa and the UNHCR, 1991; Basic Agreement, UNHCR – South African Government, 6 September 1993; Tripartite Agreement, South Africa / Mozambique / UNHCR, 15 September 1993.

In the meantime, the Aliens Control Act of 1991 survived twelve years into the post-apartheid period fulfilling the political and economic needs of the de Klerk, Mandela and Mbeki administrations. Yet, this law perpetuated a policing vision of immigration characterised by the suspicion against and the coercion of migrants. Its section 55 in particular established that “no court had any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any proceeding, act, order or warrant of the Minister, a board, an immigration officer or a master of ship.”⁸ In the tradition of ‘pass laws’, undocumented migrants were deprived of even basic rights, their time in detention and the conditions of their deportation or repatriation beyond borders being almost entirely left to the discretion of immigration officers, the police or the army. The notion of ‘public order’ (section 47) in particular allowed for considerable restrictions to undocumented migrants’ fundamental constitutional rights. This was the situation faced by a majority of Mozambicans whose refugee status was not acknowledged in urban areas before the mid-1990s. Provisions for appeal in the 1991 Act were indeed very limited thus exposing a number of South African citizens, victims of racial prejudice entrenched in police practices, to arbitrary and often extremely precarious situations (arrest, detention, erroneous deportation, etc.). Finally, the 1991 Act did not modify the 1984 legislation which had denationalised citizens from the homelands: they indeed remained foreigners subject to immigration legislation on the territory of White South Africa until 1993⁹. As a matter of fact, thousands of them were deported every year between 1984 and 1993.

Overall, what can be said about the situation of immigration in South Africa when the ANC came to power in 1994? The gap between immigration and emigration had kept on decreasing since 1991¹⁰, the ratio becoming durably negative as from 1994. In this context of sharp decrease in official permanent immigration, the proportion of African immigrants also decreased until 1992-1993 while the numbers of Asian immigrants sky-rocketed. The proportion between the three main sources (Africa, Europe and Asia) then stabilised¹¹. Quite predictably, the restriction imposed on permanent residence led to an explosion in temporary entries that went from approximately 400 000 a year in 1988 to almost 700 000 in 1992¹². This boom essentially benefited migrants from Africa, more specifically African students who represented up to 60% of foreign students enrolled at a South African university in 1996 (Ramphela 1999). At

⁸ Republic of South Africa, 27 June 1991, Aliens Control Act No.96 of 1991, Statutes of the Republic of South Africa – Aliens and Citizens, Section 55.

⁹ Date of implementation of the Interim Constitution reintegrating homelands.

¹⁰ 1991 is the last year for the granting of high subsidies to European immigration. In that year only, over 8 million Rand were directly spent on European immigration and support to organisations welcoming immigrants which resulted in a positive immigration- emigration ratio of over 10 000 people. Department of Home Affairs, 1992, Annual Report 1991, RP63, Republic of South Africa.

¹¹ Department of Home Affairs, 1995, Annual Report 1994, RP125, Republic of South Africa.

¹² Ibid.

the same time, renewals for temporary work permits constantly diminished between 1993 and 1995. Broadly speaking, there were less permanent immigrants to South Africa, those permanent immigrants no longer being exclusively Europeans. The turn of the 1990s was also the time when increasing numbers of white collar workers and professionals from Africa and Asia reached South Africa. Unable to access permanent residence because of low economic financial resources (permanent residence fees were prohibitively high at the time), they progressively occupied employments deserted by the white minority, but only in a precarious way given their status in the migration system (temporary work permits).

The new regime that came into office in 1994 had to face a rapidly changing migrant situation with a legal instrument focused on a policing and coercive vision of migration management and little or none of the necessary political distance required to assess pressing issues such as increasing numbers of asylum seekers, brain drain and brain gain phenomena or the question of undocumented migrants' rights. Existing practices, administrations and institutions in charge of migration management and the legal apparatus available ensured the continuity of a national immigration policy awaiting redefinition.

HARDENING THE IMMIGRATION POLICY AND RESTRICTING ACCESS TO THE SOUTH AFRICAN TERRITORY: *THE ALIENS CONTROL AMENDMENT ACT OF 1995.*

The arrival of the ANC to power and the post-1994 period saw a wide movement of redefinition and reorganisation of old landmarks and the production of new referents designed to forge an original form of national identity. This political institutional and symbolic work, daunting and unique in the country's history, was not without impact on the image and the condition of foreigners. What was the reality of immigration practices on the ground when the ANC took office? What kind of vision do these practices reveal regarding the vision of the new majority on the position of foreigners in post-apartheid South African society? What are the constraints resulting from the political choices made by the Mandela and Mbeki administrations on domestic as well as regional issues?

The constitutional problems raised by the 1991 text triggered a first legislative reform in the form of an amendment: the Aliens Control Amendment Act voted shortly after the ANC took office in 1995. Section 55 of the 1991 Act, problematic for the lack of appeal procedures it offered, was deleted in the 1995 text and the protection of certain fundamental constitutional rights introduced (section 54(6) on dignity, freedom, the security of persons and the right to

private property). Yet, by and large, the 1995 amendment was meant to confirm the political hardening of immigration initiated in 1991. A protectionist approach to employment and subsidised education, selection according to qualifications and the amplification of measures against undocumented migrants and, therefore, the domestic monitoring of foreigners, became the overall objectives of the Department of Home Affairs headed by the newly appointed Mangosuthu Buthelezi, leader of the Inkatha Freedom Party (IFP) and member of the Government of National Unity.

One of the main changes introduced in the 1995 text was the interdiction to change the purpose of stay once already inside the country¹³. The second objective of the 1995 amendment was to cut down the Department's expenditures, particularly on forced repatriation. To this end, the use of deposits for visas and the repossession of undocumented foreigners' belongings were systematised in order to fund forced repatriation. Visa prices were raised. Thirdly, detention procedures were modified. Time spent in detention without trial of persons suspected of being "prohibited" migrants that is undocumented, was increased to 48 hours renewable up to thirty days and then 90 days without judgement¹⁴. Yet, two sectors remained unchanged through the possibility for exemptions: the mining and agricultural sectors whose contract labourers were still exempt from general legislation as their periods of contract were not even considered as temporary work. As a result, this category of workers could never apply for permanent residence. This situation was denounced by unions and human rights organisations which resulted in contract periods being taken into consideration in applications for permanent resident status as from 1996 onwards.

Passed almost one year after ANC victory, the 1995 amendment can be considered as a rather clear indication of continuity and consolidation of the same selective immigration policy. In parallel to this consolidation process, three rather cumbersome amnesties — the last one was only set up in 2002 — for undocumented migrants were implemented from 1996 to 2002¹⁵. Mainly addressing the situation of citizens from neighbouring countries, i.e. migrant workers and ex-Mozambicans refugees, these measures were designed as evidence of South African good will within the wider framework of its incorporation into the South African Development Community (SADC). Similarly, the consolidation of refugees and asylum seekers regulation regime along with ensuing collaboration between the Department of Home

¹³ Section 30(2)(e), Aliens Control Amendment Act No.76 of 1995.

¹⁴ Section 55(5), *op.cit.*

¹⁵ For a global assessment of these amnesties, see Handmaker, Jeff, Johnston, Nicola & James Schneider, 2001, *The Status 'Regularisation' Programme for Former Mozambican Refugees in South Africa*, LHR/University of the Witwatersrand Refugee Research Programme.

Affairs and the UNHCR which resulted in an upsurge in asylum applications as from 1995, were also indications of Pretoria's commitment to sharing Africa's wider preoccupations.

In many other fields, the hardening initiated since 1991 was pursued and the legacy of negative stereotypes targeting African migrants in particular was obvious through a number of elements: police practices resorting to serious human rights abuses¹⁶, xenophobic and overtly hostile demonstrations against foreigners from representatives of various grass-root organisations, demagogic xenophobic speeches from political leaders, broadly unbalanced security discourses calling for more coercive measures from immigration officials. These typical features were characteristic of migration management during the period 1994-2003. The systematic forced repatriation and deportation policy and its corollary abuses, despite being constantly denounced, largely intensified: a total of over one million people were thus deported between 1988 and 2000¹⁷.

The adoption of this coercive approach, yet regularly criticised even by the Minister of Home Affairs himself as too costly and globally inefficient, raises doubts regarding South Africa's regional vision. The management of undocumented Mozambican migrants who are constantly being arrested, repatriated and who eventually come back to South Africa, encloses these populations originating from Southern Mozambique into a precarious cycle that prevents a durable reconstruction of this sub-region, and points to a widening of socio-economic inequalities with the South African neighbour (Wa Kabwe-Segatti 2002).

It is within this context that the Mandela government and the Department of Home Affairs decided to initiate, in 1996, a wide consultation process aimed at designing a new immigration policy and legislation. The last part of this chapter is an attempt at assessing the motivations, achievements and consequences of this process.

THE PARLIAMENTARY TRIBULATIONS OF A PATCHWORK ACT: THE IMMIGRATION ACT OF 2002.

Tracing back the different stages of this process, describing the dynamics at work behind political actors' networks or the political strategies developed and the ideological repertoires on which they were based over the seven years (1996-2003) taken to complete this reform, would by far exceed the scope of this chapter. This round of consultation resulted in the publication

¹⁶ These abuses were documented in various reports, the most complete being that of Human Rights Watch, 1998, "Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers and Refugees in South Africa, New York, Human Rights Watch.

¹⁷ Accumulated figures from the Department of Home Affairs, 1988-2001. It is very likely that the same persons were arrested and repatriated several times. Yet, this figure remains quite substantial.

of the *Green Paper on International Migration* (1997), followed by two white papers, the *White Paper on Refugees Affairs* (1998) and the *White Paper on International Migration* (1999). Eventually, two acts were passed: the *Refugees Act* of 1998 and the *Immigration Act* of 2002. Yet, this concise presentation conceals a more complex and profound opposition between three major approaches, none of which can actually be designated as a winner in the process.

The team around Minister Buthelezi, some of the Department of Home Affairs' senior officials, certain opposition parties, the New National Party and the Democratic Party in particular, were tenants of a mixed approach ranging from an ultra security and coercive vision of undocumented migrants and unqualified migrant labour management to a neo-liberal favourable stance towards foreign investors, highly qualified personnel and movements in connection with trade and services in general.

Reacting to this position, human rights organisations, particularly active under apartheid, found a new momentum in the defence and protection of undocumented migrants and asylum seekers, criticising arbitrary and often unconstitutional decisions on immigration issues. Research networks, sometimes funded by foreign aid such as the Southern African Migration Project supported by the Canadian International Development Agency and then the British Department for International Development, took advantage of the opening of a public consultation process to promote more 'enlightened' agendas. Facing a dearth of available data and the ideological bias of analyses produced by military or police related research institutes, these alternative research networks started to develop proactive approaches taking into consideration the regional dimension of migrations. While the studies carried out enabled the provision of statistical data where scarcity prevailed as well as questioned a number of stereotypes such as pull factors attracting migrants to South Africa, migrants' qualification level, their job creation capacity or expectations in terms of social benefits, the political proposals resulting from these studies were often considered as unrealistic given the relatively weak institutional capacity available in South Africa.

In this context, the ANC was slow to come up with a policy, essentially for lack of internal unity on the issue as internal faction feuds and contradictory trends prevailed. The creation of a specific study group devoted to immigration issues within the Congress probably occurred as late as 2001. The eleventh hour final Bill, introduced to Parliament on 17 May 2002, before the deadline fixed by the Constitutional Court on the modification of the *Aliens Control Act* of 1991, was in all likelihood drafted by this group. This last-minute change put into perspective the entire process, setting aside the bill developed from the 1999 White Paper on which both the Parliamentary Portfolio Commission for Home Affairs and the Department of Home Affairs team had been working for three years.

The ANC agenda on the issue is still hard to define today. Pressure exerted from the left wing of the Tripartite Alliance by the South African Communist Party (SACP) and the Confederation of South African Trade Unions (COSATU) as well as the conclusions rendered by the National Economic and Development Labour Council (NEDLAC), very critical of the Home Affairs' project, certainly pushed towards limiting the most neo-liberal aspects of the initial draft bills. The ANC left wing could only wish for stronger State and unions' control over access to the South African labour market. Yet, at the same time, COSATU, far from restricting itself to a protectionist approach, had supported, since the mid-1990s, a regional undertaking of employment and migrant labour issues¹⁸.

Confronted with these various pressures and expectations, the ANC position, with the Bill submitted in May 2002, was meant to represent, according to Mpho Scott, promoter of the Bill and then Chairperson of the Parliamentary Portfolio Commission, "a product that all of us can live with"¹⁹. This presentation conceals the actual hegemony of the majority party which, in spite of a long consultative process, eventually preferred a unilaterally drafted bill. The Bill was also, still in Scott's words, an attempt at "accommodating everyone", that was to jeopardise the political practicability of the project.

The broad orientations of the Immigration Act of 2002 and its regulations²⁰ confirm the choice for continuity and incremental transformation rather than for reform through profound transformation of the existing system. The constitutional review was in fact the only concession made to reformers' calls whereas the overall policy was perpetuating a modernised two-gate policy system. Continuity is observable through two main aspects: first, the continuation of an immigration policy relatively open to qualified immigration while being protectionist in its access to the unqualified labour market; secondly, the perpetuation of a hegemonic position in Southern Africa and the entire African continent despite the socio-economic consequences resulting from both qualified and unqualified migrant labour flows towards South Africa.

The exceptional possibilities offered to the mining and agricultural sectors, the specific 'corporate permits' for large firms, the unquestioned continuation of the differed pay system, but also the assessment of qualifications by the Department of Home Affairs all point towards continuity with the previous system, with some concessions made to the protectionist

¹⁸ COSATU Parliamentary Office, 2001 (December), Submission on the Immigration Bill, Cape Town.

¹⁹ M.I.Scott (ANC), 14-17 May 2002, Republic of South Africa, Hansard : House of Assembly Debates, 4th session, Cols 2313-2810, p.2702.

²⁰ Numerous controversies between the Department of Home Affairs, the Department of Foreign Affairs and the Presidency have already unravelled during the short existence of the 2002 Immigration Act. An amendment was already passed in 2004 highlighting the limitations inherent to the Act.

requirements of South African trade unions and the interests of South African entrepreneurs as represented by Business South Africa or the Centre for Development and Enterprise.

On the issues of undocumented migration and the management of xenophobic reactions, few progresses have been achieved. A security approach was favoured over a more regional one and the systematic forced repatriation policy was continued without any measures of social relief being even envisaged. Xenophobia, which caused a number of deaths in 1993 and dozens of physical attacks against foreigners, is largely denied and stereotypes designating foreigners as responsible for various social plagues have become commonplace in public speeches. In 2002, the then Director-General of the Department of Home Affairs, Billy Masethla, an ANC member, thus declared:

*[...] from a study conducted by the Human Sciences Research Council in conjunction with the University of Pretoria [sic] estimated that in 1996, two years after the new dispensation and the opening up of the country to the world in 1994, there were between 2.4 and 4.1 million illegal aliens in the RSA at the time. Now, 8 years later, one can safely say the minimum is at least above the estimate of 4.1 million, and probably substantially higher. This being the case it means that 10% or more of the population are illegal aliens. This equals most of the quoted unemployment figures.*²¹

The current source of xenophobia in South Africa seems essentially connected to a 'relative deprivation' logic coming from the rise of socio-economic and symbolic expectations with the advent of democracy since 1994. Yet, the capacity of the South African government to fulfil those expectations at the level of the socio-democratic ideal, i.e. its institutional capacity to deliver and redistribute, as well as in terms of identity dynamics, in reducing racial cleavages, will be the condition for accepting foreigners within South African society. If these various processes came to a stall, the acceptance of foreigners, and more specifically of African foreigners, mostly stigmatised, could be jeopardised.

The assessment of those ten years of South African immigration policy is a mixed one: on the one hand, the pursuit of a protectionist policy in such a volatile regional and continental context and without any strong domestic growth rate seems to be perfectly legitimate for the South African government. On the other, one can also be tempted to think that the very limited means granted to this policy, the absence of a regional approach and the very real xenophobia of part of the South African population vis-à-vis Mozambicans and Zimbabweans

²¹ Masethla, B.M., 15/04/2002, Remarks, Parliamentary Portfolio Commission on Home Affairs, "Presentation of the South African immigration system to the Department of Home Affairs", Cape Town, ><http://www.queensu.ca/samp/ImmigrationBillComments/DG150402.htm>.

in particular, are issues requiring a much more interventionist drive which Pretoria does not seem ready to adopt right now.

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